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ABSTRACT

This paper explores the complex issues involved in school desegregation policy and describes the trends in major Supreme Court desegregation cases through the late 1970s. The result of the Court's decision in "Brown v. Board of Education of Topeka" was ambiguous at best. Segregation was found to deny equal protection of the laws since it amounted to official sanction for the doctrine of black inferiority. However, the High Court essentially dodged the question of whether it prohibited separation that was not the result of official state policy. A year after the "Brown" decision, in "Brown II," the Court ordered the implementation of remedies for segregation, but left desegregation enforcement mainly in the hands of the offending parties. In the subsequent "Briggs v. Elliot," the district court in South Carolina interpreted the meaning of Brown I as a statement that the Constitution does not require integration; it merely forbids discrimination. "Milliken v. Bradley" in 1974 (Milliken I) was the first major metropolitan lawsuit to be ruled on by the Court. The opinions in this case revealed the emergence of two Supreme Court factions with fundamental differences about liability and remedy. "Milliken" was the first major Court decision to limit, rather than expand, the scope of desegregation remedies. This case became the beginning of the termination of more than 500 school desegregation decrees. In reality, "Brown" merely ushered in an era of "quasi-separateness." (Contains 43 references.) (SLD)

The Legal Environment of School Desegregation Policy

Brown I – Milliken I

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Introduction

Perhaps more than any other educational policy issue this century, school desegregation has unleashed fervent sentiments that stem from ideological interpretations of equal opportunity, racial integration, and social justice. Prior to the Supreme Court's decision in *Brown I*,[1] the landmark event that outlawed segregated public education, it was constitutional for African-Americans to be relegated to any place and any "thing" whites deemed appropriate under the guise of *Plessy's* "separate but equal."[2] *Brown* redefined the status of African-Americans and signified a turning point that would greatly affect public education throughout the United States.

Brown I and *Brown II*,[3] which provided implementation guidelines for desegregation, have not, by themselves, "liberated" African-Americans as was originally hoped by many. Some even argue that the 1954 and 1955 decisions, along with the subsequent uncertainty in applying the "separate is inherently unequal" principle, have been detrimental not only to Blacks' control over the education of their children and the entire public educational process, but also to the economic structure in which they participate.[4] In this light, most desegregation plans have failed to address the interconnection of changing economic structures and schooling, which ultimately determines, reflects, and controls social order. But to say that school desegregation merely does not "work" is to ignore several complex questions: How well does school desegregation work under specific circumstances? Has total desegregation been properly and completely implemented? What do we mean by 'work well'? Have school desegregation efforts come at the expense of social integration?

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[1] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[2] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[3] *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955). The Supreme Court, here, provided implementation guidelines for desegregation. Federal courts were bestowed the responsibility of overseeing the progress of desegregation "with all deliberate speed."
[4] Adair, 1984; Newby, 1979. See also Bell, 1980.

This paper will explore school desegregation policy and will attempt to address the complex issues involved. First, the concept of equal educational opportunity will be broadly explored in order to provide a conceptual context of desegregation. Second, attention will be given to the significance of *Brown* and its implications on judicial reasoning in subsequent desegregation cases. The following section will describe the trends of major Supreme Court desegregation cases through the late 1970's. Finally, the shortcomings of desegregation policy and its intricate relation to liberalism will be explored.

Equal Educational Opportunity

Liberal Equality

Located at the center of liberal theory is the concept that all individuals are created equal and as a consequence, have equal rights.[5] In other words, equality can be seen as fair competition. No one should have a better chance than anyone else to win the race of life. It is the responsibility of the state to be "the referee in life's race – the enforcer of rules."[6] The underlying notion is that all people should have the same ability to influence the outcome of public decisions.

Education has been viewed as the device through which all children are given an equal chance to learn and acquire skills, which they can eventually exchange for social goods, regardless of their economic status. Furthermore, rationality—which implies that people make the best possible choices given their options—underlies public school curriculums. It assumes to be a key component in political and economic competence, and in the development of individual ability.[7] The primary function of the "common school,"[8] therefore, is the fair distribution of rationality.

[5] Kymlicka, 1990; Strike, 1982.
[6] Strike, 1982: 171.
[7] Ibid.: 171-173.
[8] Mann, 1891.

Merit

In a liberal state, the distribution of goods should be rewarded based on how much one produces in free market. People who produce the most are entitled to more resources.[9] Economic opportunity should be given on grounds of ability, which is a major aspect of "fair competition." However, the injustice occurs whenever one is denied or excluded from education, producing, selling, etc., because of a feature, such as race, gender, or religion, irrelevant to ability. Such exclusion unfairly denies individuals to compete in the market.

Proponents of meritocracy view equal educational opportunity as a necessary precondition for equal societal opportunity. Equality of access is the main ingredient: If all children have equal access to educational institutions, then all children have the opportunity to take advantage of what is available. From this perspective, the student has the responsibility of maximizing their abilities in an environment that helps reward the most deserving. Social advancement is thus related to the effort and abilities of the student.[10] Equality consists in making the same educational experience available to each child, even if each child cannot profit equally from these experiences.

Sameness

Most children in the early twentieth century were not college-bound. For significant numbers of students the traditional liberal arts and language-oriented curriculum of the 19th century secondary schools lacked meaning. With the rapid expansion of industrialization and public education, it became clear that the common curriculum was no longer in line with the realities of the occupational

[9] Strike, 1982: 175.
[10] Stevens et al., 1987: 4-5; Walker et al., 1989: 282-3.

futures of most children.[11] "Children had different occupational futures and equality of opportunity required providing different curricula for each type of student."[12]

Equal educational opportunity took on new meaning at this time. For each student, equality did not mean the same opportunity, but rather, opportunity that was fair relative to the type of student. More funding per student, longer amounts of schooling, and compensatory programs that bridged ethnic and socioeconomic differences, were ways in which all students were provided some form of "equal treatment."[13]

Race

Our liberal democracy, which is the ideology our society is founded on, declares the distinctiveness of each individual, the political equality of all people, liberty of all humans, and insists on natural rights, autonomy, and opportunity. While affirming the natural rights of all people, our political structure has simultaneously legitimated the oppression of non-Caucasians.[14] Yet, racism, ranging from prejudice and discrimination to institutionalized slavery, is precisely anti-liberal and anti-democratic. At its core is the assertion of the unequal worth of people and of the legitimacy of affording liberty and opportunity to some, while denying them to others. Racism inhibits some groups from expressing political concerns and fully partaking in the political structure. By curtailing rights and opportunities, a liberal democracy remains unresponsive to some citizens.

While antithetical to the ideology of liberal democracy, racism has nonetheless profoundly shaped American history. Jennifer Hochschild claims that there exist two reasons for this juxtaposition. Some see racism, as did Gunnar Myrdal,[15] as anomalous: Americans are "all good

[11] Stevens et al., 1987: 32.
[12] Coleman, 1968: 137.
[13] Walker et al., 1989: 283.
[14] 1984.
[15] 1944: 1022.

people;" whites are slowly changing their ways; blacks are slowly coming into possession of their liberal democratic heritage; American idealism will eventually flourish. Others see racism and liberal democracy as a symbiotic relationship: "the state is partly driven by the force of a capitalist economy; and by its very nature, a liberal democratic state develops racist principles, practices, and structures of its own."[16]

When *Brown* turned on the issue of "separate but equal" Americans were forced to reconsider what it meant to have equal educational opportunity. More importantly, the decision reopened the debate over concepts of merit, equality, liberalism, and racial justice.

Brown

Fourteenth Amendment

The Fourteenth Amendment of the US Constitution was added in 1868, and its intent was to secure the political rights for newly freed slaves. The Equal Protection Clause of the amendment says that no state shall deny "to any person within its jurisdiction the equal protection of the law." This clause is normally interpreted as insisting that states must not inappropriately classify individuals on the basis of race or any other irrelevant factor such as sex or religion. The equal protection clause thus bears a relationship to the liberal doctrine that governments may not treat people differently "owing accidents to birth."[17]

When faced with a challenged governmental action the Supreme Court must show that its decisions derive from the Constitution, itself. Yet, Constitutional provisions, such as the Fourteenth Amendment, offer little or no direction to resolve most of the problems actually brought before the Court. Where unconstitutionality is found, the Court must attempt to show that the opinion logically

[16] Hochschild, 1984: 8.

follows from a constitutional provision, which some say, cannot usually be accomplished. Another problem that stems from the justices themselves is the legal ideal of continuity and stability that impels judges to accommodate their decisions to the formulations of prior ones.[18] In some cases, it leads to opinions that would "not otherwise be preferred by even the judges that make them."[19] The difficulty, then, in *Brown* was that post-*Plessy* Court decisions[20] had interpreted the Fourteenth Amendment as permitting segregation, in particular, school segregation. In maintaining judicial continuity, therefore, these cases had to be dealt with in *Brown*.

Argument and Decision

In *Brown* the NAACP – the plaintiffs – cited three reasons why the Court should repudiate *Plessy*, in which the earlier Court had held that racial segregation did not violate the Equal Protection Clause if the separate facilities were substantially equal.[21] The NAACP's main argument was that official classification based on race placed the stamp of government approval on the doctrine of black inferiority. For a classification between the two groups to be justified, they argued, it had to be shown that "there is a difference between the two, (2)...that the difference has a significance with the subject matter being legislated."[22]

Ideologically, however, this premise was shortsighted. The color-blind view seems to presuppose an abstract world. The rules of color-blindness are the ones that would be appropriate, and therefore be superfluous, in a society that has never encountered racial discrimination.[23]

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[17] Strike, 1982: 191.
[18] Graglia, 1976; Lawrence, 1980; Armor, 1995.
[19] Graglia, 1976: 21.
[20] *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 211 U.S 45 (1908); *Missouri v. Gaines*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).
[21] *Plessy,* (1896).
[22] Friedman, 1969: 38.
[23] Freeman, 1980: 76-77.

Second, the NAACP argued that on the basis of social scientific evidence, segregated black children were psychologically damaged. Regardless of the condition of the separate facilities, enforced segregation had a belittling effect on blacks' self-esteem, which affected their motivation and impaired their educational development. Additionally, plaintiffs argued, under segregation it was difficult for blacks to learn the social skills needed for easy integration with whites, and they faulted the system for denying children the opportunity to develop mutually respectful racial attitudes.[24]

The issue of associational rights, which is what the second argument is grounded on, was in many ways an accurate statement of what *Brown* meant for the moral consciousness of the 1950's, in which society, on most accounts, still regarded private discrimination as ethically permissible. At the time, freedom of association was a way of rationalizing *Brown* for a world that had not yet ruled out discrimination, but was beginning to do so.[25]

To substantiate this argument, Thurgood Marshall of the NAACP cited Robert Redfield's social science testimony that there were no differences between the two races. In Marshall's words, "the third point was the broader point, that racial distinctions in and of themselves are invidious. I consider it as a three-pronged attack. Any of the three would be sufficient for reversal (of *Plessy*)."[26]

Another view of *Brown* is the idea of equal educational opportunity, which is also what the plaintiffs in the case wanted to advance.[27] According to Alan Freeman, this view is ironic since the opinion has come to stand for both more and less than equality of educational opportunity. It has become more to the extent that it reached out to strike down other discriminatory practices; but much less to the extent that there is no recognized right, no ethical claim for equality of resources or a substantially effective education as such.[28] For the NAACP at the time, equality of educational

[24] Wolters, 1984; Lawrence, 1980: 59.
[25] Bell, 1980: 92-94.
[26] Friedman, 1969: 45.
[27] 1980.
[28] Ibid.

opportunity was never an end in itself. Rather, it was a means toward dealing with the greater problem of reversing the conditions associated with the history of racial oppression. Equal racial opportunity, however, was not deemed legitimate by most white Americans, at least to the extent that it threatened to impair their societal status.

The decision of the Court, written by Chief Justice Earl Warren, read in part:

> Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the *minority group* of equal educational opportunities? We believe that it does ... to separate Negro school children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in their community that may affect their hearts and minds in a way unlikely ever to be undone ... We conclude that in the field of public education, the doctrine 'separate but equal' has no place. Separate educational facilities are inherently unequal.[29]

The decision in *Brown* was thus legally justified on two separate but related grounds. The Court's major premise was that state imposed segregation was unconstitutional because it denied equal protection of the law. The second premise held that racial isolation damaged the confidence of black children and distorted their self-image.[30] Instead of simply overruling *Plessy,* the Supreme Court never explicitly stated that it does require school integration, that forced racial separation, however caused, is itself unconstitutional. The Court purported to require only school "desegregation," the school racial separation caused by unconstitutional racial discrimination.[31]

The result of the Court's decision in *Brown* was ambiguous, at best. Segregation was found to deny equal protection of the laws since it amounted to official sanction for the invidious doctrine of black inferiority. Although the litigation involved state laws that required or permitted racial segregation, the High Court essentially dodged the question of whether it was prohibiting separation that was not the result of official state policy. As stated in the passage above, Justice Warren wrote

[29] *Brown*, 1954, emphasis added.
[30] Heubert, 1999.
[31] Graglia, 1976: 13-15.

that the case concerned the "segregation of children in public schools *solely* on the basis of race." This implies there is a lack of concern of the Constitution if the races failed to mingle because of non-racial factors such as choice or geographical residence.[32]

Defenders of the Warren Court maintain that in reaching its decision, no great damage was done to the Constitution. The founding fathers, it is argued, had included the vague phrases such as "equal protection" and "due process," intended to mean whatever the Court wanted them to mean. Critics of *Brown* assert that the framers of the equal protection clause did not intend to outlaw segregation, and conclude that as a matter of law the opinion in *Brown* was egregious. In the guise of interpreting the equal protection clause, the justices of the Warren Court usurped the power to amend the Constitution. To achieve a result they regarded as socially desirable, the justices ignored the established rule for constitutional construction and read the idea of proper social policy into the Constitution. Wolters states that in *Brown,* "the justices actually clothed in constitutional attire the social values of impatient men who happened to occupy seats on the Court."[33]

Social Justification

According to the Court's opinion, since the harms suffered were unlikely to ever be undone, they presumably also affected those blacks that attended segregated schools prior to 1954. As a result, it was not just black students who were psychologically harmed by segregation, but black adults as well. The Court explicitly stated that blacks had their educational and mental development stunted by segregation. The Court's opinion is based on the fact that *only* blacks were damaged by segregation, despite the presence of social science testimony of the harm suffered by whites due to

[32] *Brown,* 1955; Freeman, 1980; Wolters, 1984.
[33] 1984: 272-275.

segregation. The decision implicitly assumes that the psychological and mental development of whites was unaffected by *de jure* segregation.[34]

There is a crucial distinction to be drawn between segregation as being grounded in a false premise that blacks are not the equals of whites, and believing that segregation actually hindered the mental, emotional, and psychological development of blacks. According to the former, desegregation as a remedy for segregation would have benefited both blacks and whites. According to the latter version, which is what the Supreme Court clearly implied, interracial exposure of whites to blacks was not beneficial to white students. The Warren Court accepted the idea that blacks were inferior to whites, but simply altered how that inferiority should be dealt with: "desegregation was essential *because of* – and not in spite of – the fact that whites were thought of by the Court as superior to blacks."[35]

White Self-Interest and Racial Equality

In the abstract, whites agree that blacks are citizens and are entitled to constitutional protection from racial discrimination. This idea of racial equality rests on the notion of how the world *ought* to be, the proper basis on which *Brown* is framed. How the world actually is, is another matter. More than three centuries of racial subordination shaped much of American institutional behavior, which also impacted the psychology of white individuals. White society thought of racism and segregation – asserted in *Brown* – as damaging only blacks.[36] Yet, it was clear that vast numbers of whites "were physically dependent on—addicted to, one might say—their belief in their superiority over blacks."[37] This point is valid today, illustrated by the present controversies over

[34] Brown, 1994; Bell, 1980.
[35] Newby, 1979: 22-25.
[36] Wilkins, 1994; Freeman, 1980.
[37] Ibid.: 616.

affirmative action programs. This is particularly difficult for those whites that must step aside for African-Americans they deem less qualified or less deserving.

This worldview suggests a broader truth about the subordination of law to political-interests, grounded in racial constructs. Derrick Bell calls this the "interest-convergence," translated from judicial activity before, during, and after *Brown*. He states:

> The interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites; however, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior social status of middle- and upper-class whites...it follows that the availability of the Fourteenth Amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken...judicial conclusions that the remedies, if granted, will secure, advance...interests of middle- and upper-class whites. Racial justice—or its appearance—may...be counted among the interests deemed important by the courts and by society's policy-makers.[38]

In assessing how this principle can accommodate *Brown* and subsequent desegregation cases, it is important to understand the shift in 1954 away from the separate but equal doctrine. Bell and Wilkins both contend that the Court's decision in *Brown* cannot be properly understood without some consideration of the decision's value to white America. There were those concerned about the immorality of racial segregation. There were also those in policy-making positions able to see the economic and political advantages of eliminating segregation.

First, *Brown* helped to provide immediate credibility to America's struggle with Communist countries to win over the minds of emerging third-world peoples. This, in fact, was one of the arguments advanced by the lawyers for both the NAACP and the federal government. Second, *Brown* offered reassurance to American blacks that the precepts of equality and freedom greatly cherished during World War II might be given meaning in their own backyard. Additionally, there were whites who realized that the South could make the transition from a rural, plantation society to the Sunbelt. This shift would have potential and profit only when it ended its struggle to remain

[38] Bell, 1980: 93-95.

divided by state sponsored segregation. Segregation was seen as a barrier to further industrialization in the South.[39]

These factors may prove insufficient as to produce and justify such a monumental decision as *Brown*. There were certainly whites for whom recognition of the racial equality principle was enough motivation. However, as with the abolition of slavery, the number of whites who would act solely on morality was insufficient to bring about the desired racial reform.[40]

For whites who sought an end to segregation on moral grounds or for the practical reasons mentioned above, *Brown* appeared a break from the past. Still, when the Court finally outlawed school segregation the backlash was strong, especially from poorer whites who feared losing control of their public schools. Poorer whites, relying on relying on the maintenance of class superiority to that kept for blacks, feared that they had been betrayed by the powers that be.[41]

After *Brown*

The Court in *Brown I* did not order the earlier decision to be implemented at the time, nor did it attempt to create a formula that could be applied to all segregated schools and districts. One year later the Court issued its decision in *Brown II*, ordering the implementation of remedies. The decision read, in part:

> The judgements below...are reversed and the cases are remanded to the district courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit the parties to these cases to public schools on a racially nondiscriminatory basis with *all deliberate speed.*[42]

[39] 1980: 95-99; 1994: 615-618.
[40] Wilkins, 1994: 615.
[41] Feagin, 1980.
[42] *Brown II*, 1955. Emphasis added.

Brown I and *Brown II* put in motion the eventual process of school desegregation that was to be mediated by the lower courts. In doing so, *Brown II* left desegregation enforcement mainly in the hands of the offended parties.

Significant Cases: *Briggs – Milliken*

Because it only ruled on *de jure* segregation, *Brown I* and *II* were primarily seen as a Southern issue. School officials and Southern federal judges relied on the language of the Supreme Court's decisions. In *Briggs v. Elliot*, a case from South Carolina, the district court interpreted the meaning of *Brown I* as not requiring racial mixing in schools or depriving parents the right to choose the schools their children attended. "The Constitution, in other words, does not require integration. It merely forbids discrimination."[43]

By 1964 tides began to turn with passage of the Civil Rights Act, which forbade the use of federal funds in segregated institutions. In its 1968 opinion of *Green v. New Kent County,* the High Court moved beyond the interpretation of *Brown I* as merely forbidding discrimination. In striking down a "freedom of choice" plan, the court explicitly rejected the defendant's argument that the fourteenth Amendment did not require compulsory integration. The court placed the responsibility on the school districts to eliminate their dual school systems immediately, in order to achieve racial balancing.[44] School districts had the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[45]

This decision emphasized that desegregation remedies had to address all aspects of school operations and not just with student assignment. A complete remedy would now be required to address what became known as the six "Green Factors:" extracurricular activities, staff assignment,

[43] 132 F. Supp. 776 (1955).
[44] Heubert, 1999.

student assignment, faculty assignment, equity of facilities, and transportation. In their desegregation plans, school districts would be responsible to address these factors in order to achieve "unitary" status.[46]

Interestingly enough, *Green* did not find "freedom-of-choice" itself unconstitutional. The Court stated that it could be one option in a desegregation plan. The decision also did not advance the concept of racial balance. Instead, the Court noted that desegregation could be achieved by geographic zoning. More importantly, the Court indicated that it was limiting the affirmative duty requirement to schools systems that were segregated by operation of law in 1954 when *Brown* was ruled.[47] The rationale for the exemption of northern districts was never made clear.

In 1971, the Court ruled in *Swann v. Charlotte-Mecklenberg Board of Education* that districts should transport students across town – if need be – to achieve the "greatest possible degree of actual desegregation."[48] The Court's decision in this case was clear and specific and ended much of the legal confusion of that time, unlike the *Brown* decisions. Still, *Swann* did nothing to curb the controversy; and in fact exacerbated it because of the unprecedented remedies it provided.[49] *Swann* created an era of extensive cross-district busing to achieve racial balance in almost every school within a district. The Court was also careful to note that racial quotas were only a starting point and not "an inflexible requirement,"[50] and that every school did not have to be balanced.

On the issue of the scope of remedy, the Court stated that a school district does not have to maintain permanent racial balance once it reaches unitary status, in the face of demographic changes. This case, additionally, did not settle the issue of school district liability for government-induced residential segregation in the absence of school district violations. Furthermore, *Swann* did

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[45] 391 U.S. 430 (1968).
[46] Heubert, 1999.
[47] Ibid.
[48] 402 U.S. 1 (1971).
[49] Armor, 1995: 28-30.

not touch on the issue of community opinion and possible white-flight from public schools. In claiming that busing and racial-balance formulas were reasonable, the Court did not explore the possibility that such policies could undermine their effectiveness and act to create resegregation between a city and its suburbs.[51] As a result of *Swann*, however, Hochschild notes that racial isolation in the South had dramatically decreased.[52]

Keyes v. School District No. 1 of Denver, Colorado[53] was the first major Supreme Court case involving a district outside the South. In 1973, the Court ruled that Northern districts could be found to have intentionally segregated their students. Even if they did not have a history of state-ordered dual school systems, they could be subject to the same mandates handed down to the South. Probably more than any other desegregation case, this decision marked a sharp departure from the basic principles established in *Brown*. In *Keyes* the liability principle was greatly modified to an extent that school boards could be held liable for school segregation arising mainly from housing segregation, unless they could definitely prove that they did not cause it.[54]

Unlike the important Court decisions from *Brown* to *Swann*, which were decided by unanimous votes, *Keyes* marked the beginning of a divided Court on the issues of *de facto—de jure* distinction and the scope of remedies. Justice Brennan expressed the views of the five justices.[55] Chief Justice Berger concurred in the result; Justice Douglas concurred further with the decision, but went on to state that there is no constitutional difference between the two forms of segregation. Justice Powell concurred in part and dissented in part on the premise that the distinction between the two should be abolished in favor of a constitutional rule requiring integrated school systems.[56] In

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[50] *Swann*, 1971
[51] Armor, 1995; Freeman, 1980.
[52] 1984: 28.
[53] 413 U.S. 189 (1973)
[54] Hochschild, 1984: 28-9; Armor, 1995: 34-5; Fife, 1997: 13-5.
[55] Armor, 1995: 37.
[56] Fife, 1997: 13.

effect, Powell would have abandoned the distinction, while at the same time, he would have jettisoned the *Swann* student assignment requirements of mandatory busing and racial balance. Justice Rehnquist disagreed with the opinion that called for more affirmative integration. Instead, he argued that more rigorous adherence to the *de jure* standard of deliberate or intentional discriminatory actions should followed.[57]

In a 5-4 decision, *Milliken v. Bradley*[58] in 1974 was the first major metropolitan lawsuit to be ruled on by the Court. The split in *Milliken* signified a turning point as it revealed the emergence of two factions with fundamental philosophical and doctrinal differences about both liability and remedy.[59] Led by Justices Brennan, Douglas, and Marshall, the "liberal" faction generally favored broader grounds for liability and more intrusive desegregation remedies. The "conservative" faction, headed by Rehnquist and Powell, tended to favor more rigorous determinations of liability, and a narrow scope of remedies to specific constitutional violations.

Initially, black students and the Detroit branch of the NAACP brought a class action suit against Michigan Governor William Milliken, the State Board of Education, Detroit's school board, and other state officials alleging racial segregation in Detroit's public schools. In a ruling that favored Bradley and the other black students, the federal district court ordered the formulation of desegregation plans for the city school district. State officials were ordered to devise plans for a metropolitan unitary system involving three counties. Even though *de jure* segregation was not found in this case, eighty-five school districts were ordered to participate, including fifty-three suburban districts. On appeal, the circuit court affirmed the district court's ruling.[60] The Supreme

[57] Heubert, 1999; Armor, 1995: 37-8.
[58] *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974).
[59] Fife, 1997: 15.
[60] Heubert, 1999; Fife, 1997: 15-6.

Court reversed the lower decisions, finding no evidence that the suburban districts had caused Detroit's segregated schools or that any unconstitutional state actions had interdistrict effects.[61]

The majority in *Milliken* elevated the concept of "local autonomy" to a "vital national tradition: "No single tradition in public education is more deeply rooted than local control of over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[62] Thus, the inclusion of the suburban districts in a metropolitan remedy was not warranted.

The reason *Milliken I* remains so important in desegregation law and policy is because it was the first major Court decision since *Brown* to limit – rather than expand – the scope of desegregation remedies.[63] Consequently, this case was the beginning of the termination of over 500 school desegregation decrees, pushing the United States into a post-desegregation era. The *Milliken* dissents illuminate the very different philosophies of the "liberal" and "conservative" factions to the extent in which desegregation had come to signify a specific degree of racial balance rather than an elimination of discriminatory practices. Justice Marshall's dissent read in part:

> Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.[64]

Desegregation Failure and Liberal Democracy

As a decision to strike down state sanctioned segregation, *Brown I* should be seen and revered as a fundamental effort by the Supreme Court that sparked American society to attempt to

[61] Fife, 1997: 17; Armor, 1995: 38-41.
[62] *Milliken*, 1974.
[63] Fife, 1997: 16.

break with its racially oppressive past. Without question, the ruling helped open doors for African-Americans that prior to it were barred. Indeed, the Supreme Court's opinion in Brown produced important positive changes in American society.

Research has shown the positive effects of certain desegregation plans. For example, the long-term rewards students get from academic achievement are mitigated by the receptivity of employers.[65] Additionally, two important factors of the desegregated schooling process have shaped the achievement gains of minority children: the length and scale of desegregation. Studies have shown the "best achievement gains for those who begin desegregation in kindergarten and first-grade."[66] Moreover, desegregation opponents tend to overlook the fact that in many cities, especially the medium-sized cities, a great deal of desegregation can be done without massive busing.[67]

Nevertheless, desegregation policy and practices have been implemented at a staggeringly slow pace. The normal process of desegregating schools has reflected an incremental approach. Jennifer Hochschild explains incrementalism as comprised of six elements: (1) decision-making through small or incremental moves on particular problems rather than through a comprehensive reform program; (2) it is endless. It takes the form of an indefinite sequence of policy moves; (3) it is exploratory in that the goals of policy-making continue to change as new experience with policy throws new light on what is possible and desirable; (4) it moves away from known social ills rather than moving toward a known and relatively stable goal; (5) it has temporal dimension, moving slow and over long periods of time; (6) it has spatial dimension, which affects only a small area or few people, instead of a policy that affects a large area or many people. More importantly, moving

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[64] *Milliken*, 1974.
[65] Crain, 1972.
[66] Ibid.
[67] Feagin, 1980: 38.

incrementally provides the minimal but essential ability to avoid disaster, leaving institutional structures in place.[68]

On a deeper level, incrementalism is at the heart of liberal democracy, so much so that even non-incremental changes do not lie within the range possible in the body politic. Proponents of incrementalism assert that "liberal democracy will only survive if all citizens agree on fundamental rights and rules, and avoid social cleavage along ideological lines...and permit all interests to be expressed and to receive at least some gratification. "[69] Hochschild continues: "Revolutionary change or futile efforts to reconstruct society synoptically violate these precepts; only incremental politics 'reduces the stakes in each political controversy enough to encourage losers to bear their losses without disrupting the political system...and maintain the vague general consensus on basic values...that many people believe is necessary for widespread voluntary acceptance of democratic government.'"[70]

On this point, we must question whose values our society expresses. How is incrementalism related to desegregation? Whose interest has desegregation best served?

Brown was monumental in its impact on addressing the problems of racial isolation and discrimination in education. At the same time, the ruling class involvement—white involvement—in desegregation reform was reserved, never intending to be a full-scale, comprehensive plan aimed at liberating African-Americans. This limited orientation is clearly seen in two basic systemic issues that usually surface in the context of desegregation debate: comprehensive school desegregation and residential segregation.[71]

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[68] 1984.
[69] Ibid.: 37.
[70] Ibid.
[71] Orfield, 1996.

Taken as a whole, school desegregation has gone little beyond racial mixing. Resegregation, in the forms of ability grouping, tracking, and school employment demotion, persists even within desegregated schools. Furthermore, the teaching orientation in desegregate schools are often slanted toward a one-way acculturation of African-American students into white "culture."[72]

There are more severe restrictions placed on the possibility of comprehensive school desegregation by rigidly segregated housing patterns in most American cities. Segregation in housing patterns is the result of decisions of rank-and-file bureaucrats; yet politicians, media, courts, and scholars infrequently discuss it in connection with school desegregation.[73]

Many rightly argue that the reasons for the lack of large-scale, comprehensive school desegregation have become clearer as time passes.[74] *Comprehensive* school desegregation does not occur because middle- and upper-class whites fundamentally oppose it. On a broad scale, patterns of political, educational, and especially economic discrimination interlock across these sectors. As a result, school desegregation has meant success for white America in its ability to rid itself of the psychological guilt due to discriminatory injustices committed against African-Americans, and in terms of providing a glimpse of hope that our country is heading down the right path. School desegregation has been the great trade-off for societal integration.

In reality, *Brown* merely ushered in a modern era of "quasi-separateness." Perhaps the problem lies in trying to achieve equality or sameness within the context of an incrementally oriented government grounded in individualism, which is inherently conflictual. *Inequality* of opportunity is consistent with liberal democracy, as we have experienced it. As a consequence, an integrated political democracy has been sacrificed.

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[72] Feagin, 1980: 42-5.
[73] Stevens, 1988.
[74] Orfield, 1996; Feagin, 1980; Bell, 1980; Freeman, 1980; Yudof, 1980.

Equality of opportunity, then, presents itself as both a description and a transcendent ideal. It presupposes a world of individuals without an economic and social class structure. More importantly, it presupposes an objective notion of merit or qualification. This structural feature of our liberal democracy is a myth to anyone outside the ruling class.

Alan Freeman argues that equality of opportunity is an ideology, which is the primary rationalization supported by practices of class domination in the United States. The internalized experience of lower class status as personal failure and as lack of ability is central to this. He further argues that for this ideology to remain effective, there must be a credible, objective notion of "qualification." For example, to discover that intelligence tests "can be regarded as rational as an intergenerational device for class cloning, is to perceive equality of opportunity as ideology...which ultimately reflects the narrower interests of the dominant classes." It is this same ideological rationalization, he contends, that has been and continues to be represented by Supreme Court desegregation cases.[75]

Conclusion

Americans revel in the belief that we have an aggregation of individuals with opportunities to succeed and fail as far as merit and ambition take them. We believe that public education is the lynchpin of equality of opportunity. It is the "great leveler—everybody shares it equally—and the great divider—a person can use success in school to rise far above their starting point."[76]

However, this belief allows us to deny the existence of systemic rigidities. That public education is free, open to all, and equal justifies the failure of some and the success of others. It also hides the class socialization that schools implicitly practice and teach. In short, schools both

[75] 1980: 87-9.

exalt the myth of equal opportunity and prevent too much of it from occurring, while forms of resegregation maintain the class structure.[77]

To a point, school desegregation may even bolster this conjunction of myth and reality. But pushed too far, desegregation undermines the hidden, yet pervasive, class structure. It does so by indirectly revealing its existence, and "directly by attacking the precarious position of poor whites and the privileged position of rich whites."[78]

The focus on equal opportunity assumes that the basic institutions, on the whole, are just. From this perspective, they do not require large-scale reform. In regard to school desegregation there have been temporary responses to a black-generated legitimacy crisis, but those responses have faded when the crisis assuaged. Even in the reform periods, what is liberally democratic (WASP) is assumed to be better because of an allegedly superior cultural heritage.

Simply providing more effective forms of school desegregation will not cure high unemployment and under-employment rates for African-Americans. The disproportionate distribution of wealth and property maintains elite class domination over this country, most heavily over non-whites. African-Americans have made significant strides in higher educational attainments. But the enormous number of jobs required to put all those needing and deserving work will require large-scale intervention into the economy, which would require massive institutional, social, psychological, political, and philosophical change. Until the nature and dynamics of its origin and continuous spread is completely understood, racial discrimination and segregation can never be adequately dealt with. Until then, equality of opportunity will continue to remain an American myth.

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[76] Hochschild, 1984: 154.
[77] Feagin, 1980; Hochschild, 1984; Adair, 1984.
[78] Hochschild, 1984: 155.

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